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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 256

DODSON BENEDEK, H. EUGENE GILBERT, LEONARD OSTROWSKY, JOHN E. RINGGER, SIDNEY L. SCHWARZ, PETER J. WANGBERG, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 333

LESTER E. BUTLER, CHARLES S. HERNDON, LAURENCE J. BRANDON, VEIT A. HAIN, JR., HARVEY S. COVA, MARTIN H. RYE, ALAN C. SPRINGER, WILLIAM E. MITCHELL, KALMAN TAGGART, JEROME STADIN, ROBERT EAKINS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. No. 256, App. A; Pet. No. 333, App. A; VIII R. 1[1]) is reported at 317 F.2d 249.

[1] "R." refers to the certified record of proceedings in the court of appeals consisting of eight volumes including the original file of pleadings in the district court. "Tr." refers to the transcript of trial proceedings.

JURISDICTION

The judgments of the court of appeals were entered on May 10, 1963 (See Pet. No. 333, App. B; VIII R. 31-47). Petitions for rehearing were denied on June 4, 1963 (See Pet. No. 256 App. B; VIII R. 48-49). The petition for a writ of certiorari in No. 256 was filed on July 5, 1963. On June 21, 1963 Mr. Justice White extended the time for filing a petition for a writ of certiorari in No. 333 to and including August 3, 1963 and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners' convictions must be reversed because they were not pointed out by witnesses as company officers and employees named in an indictment for mail fraud, where identity was never disputed during the trial.

2. Whether the trial court's limitation of time for counsel's summation denied petitioners the right to counsel.

3. Whether petitioners have been denied assistance of counsel because of an arrangement, consented to by each petitioner, under which counsel for a co-defendant would provide stand-in representation during the temporary absence from trial of his own counsel.

STATEMENT

The seventeen petitioners[2] were convicted of mail fraud in the United States District Court for the District of North Dakota and were sentenced to concurrent terms of imprisonment varying from one to five years on some counts,[3] sentence being suspended on the remaining counts. On appeal the convictions were affirmed. The scheme charged (almost identical to the scheme described in the indictment in *United States* v. *Sampson*, 371 U.S. 75)[4] was that petitioners, officers and employees of the Lenders Service Company, Inc., obtained advance fee payments from businessmen by falsely representing that the corporation was obtaining loans for such businessmen. The sufficiency of the evi-

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[2] Thirty-seven defendants were named in the indictment. The corporate defendant entered a plea of *nolo contendere*, four of the individual defendants were not apprehended and two died prior to trial. Of the thirteen individual defendants who went to trial with petitioners, ten were found not guilty. Three of those convicted did not appeal and are not before this Court.

There were 33 counts in the indictment. Counts 6 and 9 were dismissed as to all defendants. In addition, the court dismissed counts as to any defendant who had terminated his employment with the corporate defendant prior to the date of the alleged fraudulent use of the mail. The jury found the defendants not guilty as to counts 5, 16, and 17.

[3] The terms imposed (for the most part on counts 1-15) were as follows: The petitioners Benedee, 3 years; Gilbert, 4 years; Ostrowsky, 3 years, 6 months; Ringger, 4 years; Schwarz, 1 year, 1 day; Wangberg, 3 years. The petitioners Butler, 4 years; Herndon, 3 years; Brandon, 4 years; Hain, 3 years, 6 months; Cova, 3 years; Rye, 3 years, 6 months; Springer, 5 years; Mitchell, 4 years; Taggart, 4 years; Stadih, 4 years; Eakins, 3 years (V R. 824, 837-853).

[4] The corporate defendant in this case, Lenders Service Company, Inc., was the successor corporation to the Lenders Service Corporation named in the *Sampson* indictment.

dence to establish the existence of the scheme to defraud and the use of the mails to execute that scheme, is not challenged. The facts therefore may be recited briefly.

Lenders, a nation-wide corporation with general offices in Little Rock, Arkansas, and seven regional offices in large cities of various states, was purportedly organized to assist small businesses in obtaining needed financing. It operated from about June 1, 1959 to May 27, 1960, when it became the subject of bankruptcy proceedings. The petitioner Springer was president of the company and Hain, vice-president. The other petitioners (some of whom acted in several capacities) held the following positions: Butler and Gilbert, national sales director and assistant national sales director, respectively; Cova, general manager; Rye, analyst; Herndon, Mitchell, Brandon, Stadin and Eakins, regional directors; and Benedec, Ringger, Ostrowsky, Schwarz, Wangberg, and Taggart, field representatives (See opinion of the court of appeals, Pet. No. 256, pp. 14-15).

In the operation of the scheme, petitioners caused to be mailed to small businessmen throughout the nation millions of soliciting letters with enclosed "lead cards" on which the addressees were to indicate probable interest in securing loans (See 3 Tr. 509-530, 537-565; 1 Tr. 163). After the businessman responded, he was visited by a Lenders Company field representative who brought with him a pictorialized sales kit containing information about Lenders, including testimonials from supposedly satisfied clients who had utilized its service. The field representative would lead the businessman to believe either that Lenders itself was a lending agency

or that, through the use of its contacts and financial experts, it could arrange for loans of needed funds within short periods of time. The representative would obtain the signature of the businesman on a "financial service agreement". He would collect an advance fee (which might vary from $200 for a $5,000 loan to $1,000 for a $100,000 loan) with the understanding that the applicant was to pay a like amount as a "completion fee" when the loan was consummated. The representative, referring to an ambiguous clause in the agreement that a refund would be made if the contract were not accepted by Lenders, would assure the applicant that he would either obtain a loan or his advance fee would be refunded. On occasion he would represent that the company's acceptance of the contract depended upon the applicant's being qualified to receive a loan (See, e.g., 1 Tr. 157-196; 2 Tr. 309-332; 4 Tr. 830-840, 911-922, 969-988; 32 Tr. 7709-7726).

The signed applications were forwarded to Lenders. In virtually every instance the contract was accepted regardless of the financial feasibility of attempting to secure a loan for the applicant. Though only a small percentage of the businessmen to whom Lenders directed its inducements had financial qualifications worthy of presentation to potential lenders (33 Tr. 7892-7913), the company, during its one year of operation, accepted 4,207 such contracts and collected some $1,250,000 in advance fees (40 Tr. 2271-2276, 2191). Moreover, despite the fact that, from the inception of the operation, Lenders procured loans for less than one percent of the applicants from whom an advance fee had been obtained (See 3 Tr. 650-695), the company continued to advertise

its success as a loan placement expert and continued to collect advance fees on the basis of that representation.

After the advance fee had been collected and the contract accepted, Lenders forwarded to its customers at regular intervals numerous documents. Some of these communications requested additional detailed information for "analysis", but all assured the applicant (as did any representative with whom he dealt personally) that Lenders was in the process of obtaining the loan sought (See, e.g., 1 Tr. 201-217; 2 258-272; 5 Tr. 1181-1187). But neither loans nor refunds were forthcoming (See, e.g., 2 Tr. 279). Complaining applicants were met with the standard response that they had a misunderstanding at variance with the terms of their contracts, that the field representatives were independent contractors for whose exaggerated claims the company could not be responsible, or that the applicants had not furnished accurate information in compliance with the contract (See, e.g., 2 Tr. 380).

ARGUMENT

1. All of the petitioners[5] (except Hain, Cova and Rye, who testified at trial) argue that their convictions must fail because they were not identified as the persons committing the offense charged. Of these petitioners six—Benedec, Ostrowsky, Schwarz, Wangberg, Eakins and Stadin—raised this issue for the first time on appeal; the remaining eight petitioners raise it for the first time in this Court. The contention is frivolous.

[5] This is the sole issue urged by petitioners in No. 256. Petitioners in No. 333 (with the exception of Hain, Cova and Rye) adopt this point by reference.

Petitioners accept, as they must, the fact that the evidence established that persons bearing their names (most of which are somewhat uncommon) were associated with Lenders. The concordance in the names alone gives rise to an inference of identity. See 1 Wharton Criminal Evidence § 100 (12th ed., Anderson); 1 Underhill, Criminal Evidence § 125 (5th ed. 1956); IX Wigmore on Evidence § 2529 (3rd. ed.); *Hefferman* v. *United States* 50 F.2d 554 (C.A. 3); *Smith* v. *United States*, 92 F.2d 460 (C.A. 9). This inference, at no time rebutted or questioned, may be taken into consideration with all of the other facts and circumstances on the question of identity. See, generally, 20 Am. Jur., Evidence § 1222 (1939).

As the court below noted, at no point in the case from arraignment to the pronouncement of judgment and the imposition of sentence was the question of identity made an issue either by petitioners or by their able and experienced trial lawyers. Rather, Mr. Breidenbach, (counsel for Ringger, Wangberg, Brandon, Mitchell, Taggart and Eakins), in his opening statement, introduced each of his clients, had each stand twice to be identified, and spoke of their relationship to Lenders and their participation "in good faith" in the company business (1 Tr. 100-108, 126, 139). (See Mr. Breidenbach's summation 56 Tr. 13710; 13723-13743; 13745-13752). Similarly, in summations arguing the non-existence of a fraudulent scheme or the lack of knowledge thereof, counsel for Benedec, Ostrowsky, Schwarz and Stadin, counsel for Gilbert and Springer, counsel for Herndon, and counsel for Butler, named the defendants whom they represented and identified them as to their various positions

with Lenders (See 56 Tr. 13762; 57 Tr. 14010, 14015, 14018; 56 Tr. 13794, 13799; 56 Tr. 13830.) In addition, Stadin was positively identified by a government witness on cross-examination (5 Tr. 1117) and one of the several witnesses having direct transactions with Gilbert testified that he was in the courtroom (5 Tr. 1165).

As the court of appeals held, in the light of these facts and circumstances, the conclusion is compelled that petitioners tacitly admitted their identity and participation in the operations.

2. Petitioners in No. 333 argue that the time limitation placed upon their attorneys' summation denied them the right of counsel guaranteed by the Sixth Amendment. The record shows, however, a careful exercise of discretion by the trial judge with respect to this question. He said (54 Tr. 13393-13395):

> I have given this matter a lot of consideration because I do want to be fair as far as the time limit is concerned, and still we must bear in mind the fact that there are so many attorneys here that I feel that i it's at all possible to do it, that we should try to conclude the arguments within a period of a week. I also feel that the Government is entitled to equal time. Now, this is the conclusion that I have reached and I am perfectly willing to listen to discussion. I do feel that the maximum permitted should be as follows—and then I was going to inquire from various counsel if that were the order, how much of that time would be utilized, if they didn't feel all was to be necessary. I feel

> that any counsel who represents one defendant should be limited to one hour[6]; that would be * * * Mr. Sperry [representing Butler] * * *. * * * two defendants * * * an hour and a quarter. [T]hose representing three defendants should be allowed one and one-half hours. This would apply to Mr. Allen [representing Cova, Rye and one other] * * * [Counsel representing 6 defendants] should be allowed a maximum of two hours, and * * * Mr. Breidenbach [representing Brandon, Mitchell, Taggart, Eakins and three others] should be allowed a maximum of two and one-half hours. I do have in mind in that connection, Mr. Breidenbach, that as far as the order is concerned, you would be number one to present your argument also, which the Court has considered.

This reasonable exercise of discretion presents no issue for appellate review. *Capriola* v. *United States*, 61 F.2d 5 (C.A.7), certiorari denied, 287 U.S. 671; *United States* v. *Kay*, 101 F.2d 270 (C.A. 2), certiorari denied, 306 U.S. 660; *Cases* v. *United States*, 131 F.2d 916 (C.A. 1), certiorari denied, 319 U.S. 770; *Hodge* v. *United States*, 271 F.2d 52 (C.A. 5), certiorari denied, 361 U.S. 961. Indeed, the majority of defense counsel expressed satisfaction with the proposed allocation.[7]

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[6] The court's subsequent order extended this allocation to one hour and fifteen minutes.

[7] On Mr. Allen expressed definite dissatisfaction with the proposal (54 Tr. 13398). Mr. Breidenbach indicated that while his personal preference would be no time limit whatsoever, he recognized

Nothing is proved by a calculation as to the number of minutes any one defense attorney could speak as to an individual client upon the assumption that he divided his total time equally between his clients. Because of the nature of the general scheme charged and the character of the defense, typically denying the existence of the scheme or denying knowledge of it, the interests of many of the defendants coincided. Mr. Breidenbach, for example, treated all of his seven clients as salesmen, discussing generally their responsibility, before summarizing the evidence against each. (See 56 Tr. 13696-13752).

The arguments of counsel show that they had sufficient time to present petitioners' defense. Mr. Spe'ry, whose argument for petitioner Butler covers some 49 pages of the transcript, announced that he was grateful to the court for permitting him to talk beyond the hour and fifteen minutes allotted to him (56 Tr. 13858). Both Mr. Breidenbach and Mr. Allen (in arguments covering, respectively, 83 and 70 pages of transcript), despite protestations to the contrary, had time for discussion of the evidence and for "the wit, the pathos and al. of those techniques"[8] of which they now speak (Pet., No. 333, p. 15). Petitioners have no cause for complaint.

3. A pre-trial conference held by the court on March 2, 1961, with the consent of the defendants (See II R.

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the problems "in this conjunction". He said "* * * two and a half may be adequate. I don't know." He expressed some concern as to whether he were capable of talking longer than that (54 Tr. 13403-13405).

[8] With Mr. Allen, this consisted in large measure of an attack on the bringing of "this kind of trial" and "this ponderous document" (the indictment). (See 57 Tr. 13941 et seq.; 13989 et seq.).

339, 343, 365, 383-386, 435, 465, 466, 510, 511, 513, 515), resulted in a number of orders including the following (II R. 478):

> Should any counsel desire to be temporarily absent during any part of the trial, an adequate record shall be made in advance concerning the same; the respective client or clients must consent thereto, in advance, in writing; which consent shall be filed with the Clerk of this Court, and arrangements shall be made for representation of such client or clients by other counsel who are present during such absence, all of which record shall be in writing, consented to by the defendant or defendants involved, in person, and duly filed with the Clerk."

Pursuant to this order, the defendants filed written instruments evidencing their consent to the temporary absence of retained or court-appointed counsel and to representation by other counsel in such absence.[9] It

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[9] See, *e.g.*, the first of the numerous consents filed by petitioner Springer on March 14, 1961, in which he consented "to the departure of my attorney, Edward M. Cohen, from the Court Room during the trial at the following times: 3:30 every Friday afternoon; March 23 and 24, 1961, all day; April 28, 1961, all day. I do hereby consent also to the appointment of Max D. Rosenberg * * * of Bismark, North Dakota, as my attorney during the intervals that Mr. Edward M. Cohen is absent from the Court Room" (II R. 518).

Petitioners Brandon, Mitchell, Eakins and Taggart agreed and consented "that our attorney Frances Breidenbach * * * is hereby authorized * * * to absent himself from the trial of this action upon making suitable arrangements for our representation by another attorney during his absence, and we each do further agree that his absence * * * shall not be used by us as a reason for a delay or an assertion of error" (III R. 535).

Stadin and other defendants consented on March 16, 1961 "that

does not appear that a written consent was filed upon every occasion when a substitute lawyer appeared; the record indicates however that where no such written instrument was filed, an oral consent was given and an oral appearance noted. There is therefore no basis for the complaint by petitioners in No. 333, raised for the first time on appeal below, that this arrangement deprived them of their right to counsel.

The Court's concern for the protection of the defendants under the arrangement is reflected in this record. Thus, on the morning of May 23, 1961, when the court discovered that the petitioner Springer had not signed a form consenting to representation by substitute counsel in the absence of his regular and associate counsel (31 Tr. 7556), it recessed the trial until the following morning, after making every effort to ascertain the petitioner's wishes, assuring him that he was under no pressure to consent to representation by other counsel (31 Tr. 7558, 7559-7560, 7562, 7563), and ob-

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our attorney Max N. Rosenberg, may be absent from the trial if he deems it necessary and may designate other counsel to act in his stead" (III R. 522).

Butler, on March 17, 1961, consented that "counsel, Floyd B. Sperry, may be absent from said trial, except for making the opening statement in behalf of the defendant, causing his evidence to be introduced, and making his argument to the jury therein, with the understanding that his counsel will attend said trial proceedings as his time permits and whenever necessary to protect the interests of this defendant" (III R. 525).

Herndon on March 27, 1961, consented "to be represented in court during such time, if any, as his counsel may be absent therefrom, by the firm of Cox, Pearce and Engebretson * * *" (III R. 531; See also III R. 546).

Hain authorized his "attorney William S. Murray to be absent from Court during the trial of such action, at such times as he deems it necessary" (III R. 534).

serving "The preservation of your rights are more important than this short delay" (31 Tr. 7563). The court at this time read to counsel the pre-trial order (31 Tr. 7568) and stated (31 Tr. 7570-7571):

> Because of the length of the trial, the Court certainly realizes the necessity of absence of some counsel from time to time. To the best of my knowledge, all of you have been very, very careful about strictly complying with the pre-trial order. I have assumed that the proper records have been made in advance, as ordered, and, to the best of my knowledge, this is the first time this situation has developed. I think, however, that it is vital and I think that the only thing we can do is to adjourn until counsel can arrive.

On the following morning the court requested that, thereafter, each attorney representing clients other than his own should announce at the beginning of each morning session the names of such clients and that a record be made promptly during that day of any change of arrangements (31 Tr. 7574).

If the chart presented in this Court by counsel for petitioners shows anything,[10] it emphasizes the extent to which the court's protective request in this regard was complied with (See Pet. No. 333, App. D, pp. A11-

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[10] It does not reflect the importance or unimportance of a particular temporary absence of counsel in relationship to the interest of a particular client, as, for example, the fact that any absence occurring subsequent to June 20, 1961 was at a time when the government had rested its case in chief and all of the petitioners except Hain had rested (42 Tr. 10231, 10251-10265).

A43). The record shows moreover that at no time was the court ever apprised of any possible conflict of interest resulting from the arrangement. There was in fact no such conflict. The specific illustrations advanced here by petitioners in an attempt to show prejudice (Pet. No. 333, p. 9) demonstrate that the claim is plainly an afterthought. For example, it is of no consequence that one counsel, Lindell, who represented company salesmen during the trial, substituted as counsel for petitioners Mitchell, Brandon, and Eakins, who were company regional directors, and for Taggart, another salesman, upon two occasions after these four petitioners had rested their case. The defendants had a common defense. Nothing said by Lindell on summation represented conflict with the interest of the officers of the corporation; in arguing that the salesman he represented were pawns of the company he specifically noted that he had expressed no opinion as to the existence or non-existence of a scheme (56 Tr. 13761). Moreover it was the position of Mr. Breidenbach that his clients Mitchell, Brandon and Eakins as regional directors were themselves nothing more than "glorified salesmen" (56 Tr. 13714). Similarly, it is difficult to appreciate the significance of the fact that Hain's attorney stood in for Mr. Breidenbach's clients (as petitioners' chart shows, upon one occasion; see App. D, Pet. No. 333 p. A42). It is apparent that these assertions of prejudice now made are too tenuous to warrant serious consideration. See *United States* v. *Simone*, 205 F.2d 480 (C.A. 2).

The petitioners in No. 333 refer to the danger of a mass trial and indicate that, if certiorari is granted, they will discuss the issue of whether they have been denied due process because of the joinder of parties and counts. But the fact that they have found so little to complain of in this trial shows both the care exercised by the judge and the justification for joining the defendants who participated (some in dual or triple capacity in their relationship to the company defendant) in the same series of acts or transactions covering a nation-wide scheme. As the court below observed "The record is remarkably free of any error that could have been conceivably prejudicial to any of the appellants."

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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